TEOH CHUAN AIK & ANOR v. WAFONG CREDIT SDN BHD & ANOR

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
[CIVIL SUIT NO: AB-22NCvC-17-04-2021]
16 JUNE 2024

Abstract – *The general principle is that if there is a personal interest, then only counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or the law firm, as to avoid being embarrassed in the course of the trial. However, if no other counsel of the firm is implicated, then they should not be disqualified from handling the case. The courts ought to secure a fair trial between the parties, and to prevent an abuse of the court process which is intended to deprive parties of their right to a counsel of their choice.*

LEGAL PROFESSION: *Practice of law – Practice and etiquette – Whether legal firm ought to be removed from acting as solicitors in suit – Whether there was pecuniary interest – Whether legal firm breached Legal Profession Rules (Practice and Etiquette) 1978 – Whether counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or law firm – Right to counsel of choice – Whether ought not to be deprived*

CIVIL PROCEDURE: *Preliminary objection – Practice of law – Practice and etiquette – Whether legal firm ought to be removed from acting as solicitors in suit – Whether there was pecuniary interest – Whether legal firm breached Legal Profession Rules (Practice and Etiquette) 1978 – Whether counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or law firm – Right to counsel of choice – Whether ought not to be deprived – Whether preliminary objection proved on balance of probabilities*

The plaintiffs, husband and wife, were the registered owners of two properties ('properties'). The plaintiffs entered into two loan agreements with the first defendant totaling RM1,200,000 and the properties were charged as security for the loans. The first defendant, however, allegedly did not comply with the mandatory requirements of the Moneylenders Act 1951 and rules thereunder. The plaintiffs contended that the loan agreements were defective wherein certain clauses had been intentionally omitted by the first and second defendants. It was alleged further that Andrew Soong, a partner of the second defendant who acted for the second defendant, was not appointed by the plaintiffs and that he was a close friend of the first defendant and that they did not know him. Moreover, despite the loan amount stipulated in the loan agreements, the plaintiffs only received an amount of RM607,976.40. In a preliminary objection, the plaintiffs objected to Messrs BH Koh, Soong,

Zarin & Partners ('second defendant's firm') acting as solicitors for the second defendant in the suit, who happened to be the same law firm. The plaintiffs submitted that the second defendant's firm had breached the Legal Profession Rules (Practice and Etiquette) 1978 ('1978 Rules') because Andrew Soong and the second defendant had a pecuniary interest in this suit. The plaintiffs contended that it was questionable if counsel from the second defendant would be able to uphold the dignity of the profession since they would defend their own firm and partner at all costs. The preliminary objection was intended to remove the second defendant's firm from acting for the second defendant as there was no guarantee that the second defendant's counsel were independent and that they would not be prejudiced if the preliminary objection was upheld by the court. Hence, the issue of 'pecuniary interest' of the second defendant in this suit must be taken into consideration by the court to allow the preliminary objection. It was argued that the second defendant should be represented by another law firm as counsel who appeared for the second defendant in the preliminary objection could not be independent when the suit involved his partner. However, counsel for the second defendant, *inter alia*, argued that the preliminary objection should be dismissed by the court because Andrew Soong was not appearing as counsel to defend the suit and that the lead counsel, one Cheong Yau Kheong, was allowed by law to represent his firm, the second defendant.

Held (dismissing plaintiffs' preliminary objection):

(1) This court was able to gauge the role of Andrew Soong in the transactions alleged by the plaintiffs and it sufficed to say, he should not act as counsel to represent the second defendant to defend itself in the suit. The general principle is that if there is a personal interest, then only counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or the law firm. (para 15)

(2) The second defendant firm would not be embarrassed, as stated in Rule 3, because there was nothing in the pleadings which implicated others in the firm. When counsel asks a question in cross-examination to a witness at the trial later, he would already know the answer and that is the general principle in advocacy; otherwise one would be going on a fishing expedition (para 18)

(3) The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. Referring to O. 92 r. 4 of the Rules of Court 2012, it does not limit the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. This power must be used judiciously when the need arises, such as in the present case. It is exercised where it is just and equitable to do so, to ensure the observance of the due process of law, and to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. (para 19)

(4) The plaintiffs' preliminary objection had not been proved, on a balance of probabilities, that counsels of the second defendant should be disqualified from handling the case, other than Andrew Soong, who had been named in the statement of claim and reply to second defendant's defence. But by virtue of the 1978 Rules, it was not advisable for Andrew Soong to represent the second defendant in the suit as he may be embarrassed in the course of the trial. This court invoked its inherent power in making this ruling power to prevent an abuse of the court process which was intended to deprive the second defendant of their right to counsel of their choice. (para 22)

Case(s) referred to:

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Messrs Roland Cheng & Co v. Elizabeth Ng Yuk Lee [2022] 10 CLJ 777 HC ***(refd)***

Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd [2008] CLJU 276; [2008] 1 LNS 276 HC ***(refd)***

Re A Firm of Solicitors [1996] 3 WLR 16 ***(refd)***

Taylor v. AG [1975] 2 NZLR 675 ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 FC ***(dist)***

Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 5, 27(a), 28, 31
Rules and Rulings of the Bar Council 2015, r. 11.04
Rules of Court 2012, O. 92 r. 4

For the plaintiffs - Gurbachan Singh Bagawan Singh; M/s Sandeep Gobindeep & Co
For the defendants - Lim Ta Wai & Mohammed Azmi Shahruddin; M/s Khong & Son Cheong Yau Kheong & Siti Aishah Mohamed Azahari; M/s BH Koh, Soong, Zarin & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Ruwena Md Nurdin JC:

Background

[1] The parties herein will be referred to as they are at the High Court. A notice of appeal to the Court of Appeal was filed by Messrs Sandeep, Gobindeep & Co on 3 May 2024 on behalf of the plaintiffs against the decision of this court dated 3 April 2024. The decision was in respect of a preliminary objection ("the PO") by the plaintiffs in encl. 79 of this civil suit. I now give my reasons for dismissing the PO in this grounds of judgment.

[2] The PO in encl. 79 was a letter dated 28 March 2024 that was filed rather late, *ie*, a few days before the trial of this suit was supposed to commence. The trial dates were set for 1-4 April 2024. The letter stated that

the plaintiffs objected to Messrs BH Koh, Soong, Zarin & Partners acting as solicitors for the second defendant in the suit who happened to be the same law firm. It was the plaintiffs' contention that Messrs BH Koh, Soong, Zarin & Partners cannot represent itself in breach of the Legal Profession Act 1976 and Legal Profession Rules (Practice and Etiquette) 1978 in particular Rules 5, 27, 28 and 31.

Hearing On Preliminary Objection

[3] The plaintiffs are husband and wife, who are registered owners of two properties known as PM 9454 Lot 316630 Mukim Asam Kumbang, Daerah Larut Matang, Negeri Perak and PM 9455 Lot 316631 Mukim Asam Kumbang, Daerah Larut Matang, Negeri Perak ("the properties"). The plaintiffs had entered into two loan agreements with the first defendant totalling RM1,200.000 and the properties were charged as security for the loans. It was alleged that the first defendant did not comply with the mandatory requirements of the Moneylenders Act 1951 (Act 400) and Rules thereunder.

[4] It was also contended in the plaintiffs' statement of claim that the loan agreements were defective wherein certain clauses had been intentionally omitted by the first defendant and the second defendant. It was alleged further that Andrew Soong Tze Toong, a partner of the second defendant who acted for the second defendant, was not appointed by the plaintiffs and that he was a close friend of the first defendant and that they did not know him. Moreover, despite the loan amount stipulated in the loan agreements, the plaintiffs only received an amount of RM607,976.40.

[5] During the hearing of the PO on 1 April 2024, the court heard oral submissions by the parties and referred to a few case laws cited by them. The plaintiffs' counsel submitted that Messrs BH Koh, Soong, Zarin & Partners had breached the said Rules because Andrew Soong Tze Toong ("Andrew Soong") and the second defendant had a pecuniary interest in this suit. The plaintiffs' counsel submitted that the plaintiffs and the court did not know if the counsels from the second defendant's firm appearing for the second defendant in the suit had pecuniary interest in the matter or if they would be appearing as witnesses. Therefore, it was contended that it was questionable if counsels from the second defendant would be able to uphold the dignity of the profession since they would defend their own firm and partner at all costs.

[6] The PO was intended to remove the second defendant's firm from acting for the second defendant as there was no guarantee that the second defendant's counsels were independent and that they would not be prejudiced if the PO was upheld by the court. Hence, the issue of "pecuniary interest" of the second defendant in this suit must be taken into consideration by the court to allow the PO.

[7] The plaintiffs' counsel submitted that the Federal court decision in the case of *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870; [2000] MLJU 838 applied to the present case as it was still good law and had not been overruled. It was argued that the second defendant should be represented by another law firm as counsel who appeared for the second defendant in the PO could not be independent when the suit involved his partner, Andrew Soong. The court was also referred to the case of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719; [2015] 1 MLRA 107 which was a case where learned counsel for the plaintiffs and his law firm were litigants in the said case. The pertinent fact in that case was that counsel (first appellant) and his law firm (second appellant) were represented by another law firm in the suit. Therefore, this court was urged that it was the only way to proceed, *ie*, that the second defendant appoint another law firm to represent it.

[8] Counsel for the second defendant submitted in reply that the PO was defective as the letter was not served upon the second defendant by giving them four clear working days' notice in accordance with r. 11.04 of the Rules and Rulings of the Bar Council 2015. Nevertheless, counsel for the second defendant proceeded to submit on the merits of the PO. It was argued that the PO should be dismissed by the court because Andrew Soong was not appearing as a counsel to defend the suit and that the lead counsel, Cheong Yau Kheong was allowed by law to represent his firm, the second defendant. counsel relied on the decision in the case of *Messrs Roland Cheng & Co v. Elizabeth Ng Yuk Lee* [2022] 10 CLJ 777; [2022] MLRHU 2133, and stated that here, there was no solicitor-client relationship being disputed. That was the situation in the case of *Vijayalakshmi Devi Nadchatiram* (*supra*) and therefore, the Federal Court decision was not applicable to the present case and neither was this court bound to rule that the second defendant could not be represented by counsel of its choice. Rule 27 was not applicable in the present case.

[9] In reply, this court was urged by the plaintiffs' counsel that the law firm was akin to a company which was being sued and that a company cannot act in person. Hence, if the second defendant is allowed to represent itself, learned counsel submitted that the decision in *Vijayalakshmi Devi Nadchatiram* (*supra*) will be of no value.

The Relevant Law

[10] Foremost is r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978 ("the Practice and Etiquette Rules") which provides:

> 3(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises:
>
> (i) ...

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

[11] Rules 27 and 28 state:

Rule 27. Advocate and solicitor not to appear where pecuniarily interested.

(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

(b) This rule does not apply to the case of an advocate and solicitor appearing himself to tax his own costs.

Rule 28. Advocate and solicitor not to appear in a case where he is a witness.

(a) An advocate and solicitor shall not appear in court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the court below.

(c) These rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

Evaluation And Findings Of The Court

[12] As there was no notice of application on this matter and only a PO letter, the court relied on the case laws cited and on research as well as the pleadings filed in order to ascertain whether there was basis for the PO made very late by the plaintiffs', *ie*, just a few days before the trial was supposed to commence and not during the PTCM stage when quite a number of case management session had been conducted with me.

[13] Nevertheless, I will go on to consider some of these cases which this court viewed warranted some explanation. The Federal Court held in *Vijayalakshmi Devi Nadchatiram* (*supra*) that:

Having considered this appeal before us on the question so framed, we are of the firm view that having regard to the personal relationship of the respondent to those whom she is or was representing and the pecuniary interest she is alleged to have in those matters, though they were subject to their being litigated in open court, the subject matter of which we express no opinion either way, we are of the firm view that the respondent is prohibited from acting for those persons in view of her personal relationship and of her pecuniary interest by reasons of rr. 3 and 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

In saying so we are of the view the Court of Appeal, in their decision to allow the appeal had erred. The Court of Appeal with respect, erred in not focussing their attention to an elementary tenet of construction in finding the meaning of "personal relationship" and "pecuniary interest". Their approach should have been to ask the relevant question, which was, what is the purpose of the rr. 3 and 27(a)? We cite s. 17A of the Interpretation Acts 1948 & 1967:

> 17A. Regard to be had to the purpose of Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The Court of Appeal would have found the answer. The objective of the provision lies in the fact that the Bar had set a high standard of practice. The Bar requires that an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. *Thus the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest. The mischief to be cured and the intention of the Rules are too clear to be ignored. The provision are too clear to admit of any doubt or dispute. They had been so framed to preserve the integrity of an advocate and solicitor so that he may not be in conflict of interest and by the same token ensures that when he acts for a client he is independent and free vis-a-vis both when representing the client and performing his duty as an officer of the court in which he appeared.*

In this regard we would apply the decision of *Black v. Taylor* [1993] 3 NZLR 403 where the Court of Appeal in New Zealand held that "the court may prevent a barrister acting as counsel in a matter which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done.

(emphasis added)

[14] On the facts of the *Vijayalakshmi Devi Nadchatiram* (*supra*), it was very clear to this court that the case could be distinguished on the facts. Meanwhile, the case of *Messrs Roland Cheng* (*supra*) referred to by the second defendant, although was a High Court decision, I found it to be of some guidance to this court in order to arrive at a proper and just decision on this PO. The relevant parts of the High Court decision are reproduced below as follows:

[20] As Mr Roland Cheng is in effect, a de facto litigant representing himself in the Magistrates' Court Suit, r. 27 and 28 is not applicable. In *M/s Thomas, Shankar Ram & Co Advocates v. Jeffrey Law Siew & Ors* [2009] 5 MLRH 109; [2010] 10 CLJ 350, the High Court per Rhodzariah Bt Bujang JC (as her Ladyship then was) held:

> Yet, there is a distinguishing feature in the cases cited by them which is so apparent in this case – it is that the advocates here,

being the only partners in the plaintiff firm, are themselves the *de facto* litigants unlike in the cited cases where they were acting for the litigants.

The nature of the plaintiff's claim in this case is such that the partners themselves need to depose the affidavits as this action concerns matters pertaining to their rights and duties as counsels in the suit action and the related appeals and the analogy drawn by Mr Shankar Ram with respect to a lay person acting for himself is, in my view, appropriately made. However, after some consideration I am of the view that r. 27(2) cited by Mr Shankar Ram is not applicable to their case – that Rule is specifically meant for a taxation proceeding where an advocate has presented his bill of cost to be taxed by the court and is not meant to cover just any case where cost is an issue or a subject matter of dispute. *However, I am certain that r. 27(1) which says that an advocate shall not appear in any matter in which he is directly pecuniarily interested refers to actions filed by others in which he is so related – not to one where he is sued or being sued in person (or as a partner of a firm as in this case). Similarly with r. 28(1). It is also to prevent an advocate to act or to continue acting for his client if he knows that his possession of material and disputed facts is such that it will make him a potential witness in the case*.

...

[23] In fact, the right of an advocate to represent himself and to be a witness is expressly recognized in r. 30(a) of the 1988 Rules which provides that "An advocate who appears in person as a party or who is in the witness box shall not wear robes." Thus, under r. 30(a), Mr Roland Cheng could not wear robes if he appears as a litigant in open court. In the present case, Mr Roland Cheng has elected to conduct his own case and is not appearing as counsel for another party. Hence, r. 27 and Rule 28 does not apply to the present case and does not preclude Mr Roland Cheng from acting for himself and/or his law firm in the Magistrates' Court Suit. Further, the right to sue in person is clearly and expressly provided for in O. 5 r. 6 ROC 2012.

(emphasis added)

[15] From the pleadings filed, the court was able to gauge the role of Andrew Soong in the transactions alleged by the plaintiffs and suffice to say, he should not act as counsel to represent the second defendant to defend itself in the suit. I noted that in many case laws on the issue of rr. 27 and 28 refer to situations where there arose a conflict of interest because the counsel had acted for one party and then at the next stage acted for the opposing party, including the case of *Gurbachan Singh* (*supra*) where the Federal Court dismissed the appellants' appeal. But the general principle is that if there is a personal interest, then only the counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or the law firm. As

stated above, in *Vijayalakshmi Devi Nadchatiram* (*supra*) the facts could be distinguished from the facts in the present case. Nevertheless, if the court is wrong on this issue, the court had considered the principle in that case as below.

[16] The leave question to be answered by the Federal Court in *Vijayalakshmi Devi Nadchatiram* (*supra*) were:

> Whether the Court of Appeal was correct in law in their interpretation of the proper construction for Rules 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and their application of the same against the respondent, in particular:
>
> (a) the proper construction and meaning of the words "personal relationship" within rule 3 of the Legal Profession (Practice & Etiquette) Rules 1978; and
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> (b) the proper construction and meaning of the words "directly pecuniarily interested" within rule 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978.

[17] The Federal Court held that "having regard to the personal relationship of the respondent to those whom she is or was representing and the pecuniary interest she is alleged to have in those matters, we are of the firm view that the respondent is prohibited from acting for those persons in view of her personal relationship and of her pecuniary interest by reasons of rr. 3 and 27(a)". The Federal Court stated further that the Bar requires that "an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. Thus, the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest". The facts in that case showed that the respondent and appellants were clearly siblings. The Federal Court held:

> Clearly the respondent has a personal relationship to the defendant. Counsel submitted in Action No. 4 at p. 220 para 10.1 of the record of appeal, the pleadings (writ at p. 527 of the record of appeal) disclosed that the plaintiff therein is the daughter of the appellant and niece of the respondent. The plaintiff therein is suing both the mother and father as second defendant and 3rd defendant who are the appellants. The respondent is under a personal relationship without any dispute.
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> ...
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> As for the meaning of pecuniary interest, counsel cited to us the case of *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230 where at p. 235 where Wan Yahya J (as he then was) after discussing other relevant authorities said:

> In my view any interest relating to money or money's worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest.
>
> ...
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> That being our decision, we would answer the question framed that the Court of Appeal with respect, had erred in law in the interpretation of the proper construction of rr. 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and the application of the same against the respondent. That being our decision we allow the appeal and restore the decision of the High Court Seremban dated 23 March 1996 that the respondent be so restrained in all actions except No. 4 with costs here and below. Deposit shall be refunded to the appellant.

[18] Applying the principles in that case to the present case, bearing in mind that Andrew Soong being a partner of the firm, the court found that he did not have the kind of personal relationship envisaged in *Vijayalakshmi Devi Nadchatiram* (*supra*) with the plaintiffs. Having said that, the court did not find that the second defendant firm would be embarrassed as stated in r. 3 because there was nothing in the pleadings which implicated others in the firm. Moreover, this court opined that when counsel asks a question in cross-examination to a witness at the trial later, he would already know the answer and that is the general principle in advocacy; otherwise one would be going on a fishing expedition.

[19] It is trite that the right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. Referring to O. 92 r. 4 of the Rules of Court 2012, the Rules do not limit the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. This power must be used judiciously when the need arises, such as in the present case. It is exercised where it is just and equitable to do so, to ensure the observance of the due process of law, and to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them: *Taylor v. AG* [1975] 2 NZLR 675 (Malaysian Civil Procedure 2021 at p. 1339).

[20] Andrew Soong did not argue for the second defendant on 1 April 2024 and in fact he was also not robed nor seated at the Bar during the submissions on the PO. This court referred to the judgment of Wan Yahya J (as His Lordship then was) in *Wee Choo Keong v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346; [1990] 2 MLJ 239 where His Lordship interpreted r. 28 of the Practice and Etiquette Rules 1978 and stated:

> This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in court the moment he believes that he will be a witness. That ethical restriction will only arise

if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

[21] In the case of *Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd* [2008] CLJU 276; [2008] 1 LNS 276; [2008] 8 MLJ 567, the court stated that the lawyer's role in the settlement agreement would in all probability potentially make him a witness of material and disputed question of facts. The court held that "As a sole proprietor he could not defend himself on the basis of *Re A Firm of Solicitors* [1996] 3 WLR 16. He was in no position to testify that no confidential information had passed to him in the same way the solicitor did in that case (see paras. 15 & 17).

[22] The court found that the plaintiffs' PO had not been proved on a balance of probabilities, that the counsels of the second defendant should be disqualified from handling the case, other than Andrew Soong who had been named in the statement of claim and reply to second defendant's defence. But by virtue of the 1978 Rules, it is not advisable for Andrew Soong to represent the second defendant in the suit as he may be embarrassed in the course of the trial. The court invoked its inherent power in making this ruling power to prevent an abuse of the court process which was intended to deprive the second defendant their right to counsel of their choice.

Conclusion

[23] Premised on the above considerations, the plaintiffs' PO was dismissed with no order as to costs.